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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 210

FLOYD CHARLES FALLEN,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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March, 1964

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court below is reported at 306 F.2d 697 and is set forth in the printed Transcript of Record ("R.") at pp. 76-92. The District Court's Order With Respect to Notice of Appeal, appearing at R. 49-53, is set forth *in toto* in the opinion of the Court of Appeals, 306 F.2d at 699, fn. 1 (R. 78-79).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). On June 17, 1963, this Court granted petitioner's motion for leave to proceed *in forma pauperis* and his petition for a writ of certiorari. 374 U.S. 826.

Provisions Involved

The provisions of the Fifth and Sixth Amendments to the Constitution, and of Federal Rules of Criminal Procedure[1] 37 (a)(2) and 44, are set forth in Appendix A.

Question Presented

Must the Court of Appeals, consistently with Rule 37, review petitioner's criminal appeal on the merits, where:

(1) Petitioner wrote and put in the prison hospital mail box, on the eighth day following his conviction, a motion for new trial and a notice of appeal;

(2) Petitioner did have not have the benefit of counsel subsequent to his sentencing until the District Court set down for hearing his motion for new trial and his notice of appeal, and petitioner was not advised of his right to counsel for purposes of appeal; and

(3) The District Court took no action with regard to petitioner's appeal even though petitioner made an inquiry about appeal?

Statement of the Case

On January 15, 1962,[2] petitioner, upon a jury verdict in the District Court in Jacksonville, Florida, was adjudged guilty of conspiracy to violate the postal laws (18 U.S.C. § 371), aiding and abetting in the breaking into a United States Post Office with intent to commit larceny (18 U.S.C. § 2115), and converting money and things of the Post Office

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[1] All references to "Rules" throughout this Brief are to the Federal Rules of Criminal Procedure, unless otherwise expressly stated.

[2] All dates throughout this Brief are in 1962, unless otherwise expressly stated.

to his own use (18 U.S.C. § 641), and was sentenced to consecutive terms of, respectively, five, five, and ten years, for a total of twenty years in prison (R. 42-44). This sentence was imposed although it was pointed out to the Court by Court-appointed counsel who had represented petitioner at the trial that petitioner had only permitted others to use his vehicles and other articles (R. 41). Petitioner, a paraplegic confined to a wheel chair, requested that the sentences be concurrent (R. 24, 41).

The record of the sentencing by the Court concludes as follows:

> "The Court: * * * Now, that is all.
>
> "The Defendant: Can I appeal this case, Your Honor, as an insolvent?
>
> "The Court: Beg pardon?
>
> "The Defendant: May I appeal this case as an insolvent?
>
> "The Court: Oh, yes, you always have a right to appeal; the Government provides for that.
>
> "So that will be all. We are through with this case.
>
> "Mr. Marshall, you may take charge of the defendant.
>
> "The Marshall: Yes, Your Honor.
>
> " . . . And thereupon the hearing was concluded" (R. 41).

Petitioner, who had been confined under guard in a Jacksonville hospital during his trial, was taken back to the hospital after the sentencing. On the following day, the Government removed him to the hospital in the Federal Penitentiary in Atlanta, Georgia.

During the ten days following his conviction, neither the Court nor Court-appointed counsel advised petitioner of his right of appeal, his right to counsel on appeal, or the time limits pertaining to criminal appeals in general or

in forma pauperis appeals in particular. Petitioner himself, who had first raised the question of his appeal rights in his questions to the Court, took the next step.

On the eighth day following his conviction, on January 23, petitioner wrote two letters to the United States District Court in Jacksonville, which were received and filed by the Clerk of that Court on the fourteenth day, January 29. The contents of one of the letters was as follows:

> "Since I haven't heard from the lawyer I would like for this letter to ask for 'A Motion for a New Trial'.
>
> "The basis of the new trial is that the trial judge erred in his charge to the jury—also the evidence did not warrant conviction on those charges" (R. 45).

And the other:

> "I would like to appeal the court's decision in my case.
>
> "I would like to get the court record as a pauper." *Ibid.*

Judge Reeves, who had presided at petitioner's trial, was not in Jacksonville at that time, and Chief Judge Simpson took action in response to petitioner's letter. The Chief Judge contacted the Court-appointed counsel who wrote a letter on January 30 summarizing the conversation between himself and petitioner directly following the sentencing on January 15. In pertinent part counsel stated:

> "At that time I told Mr. Fallen that the firm with which I am associated did not wish me to undertake any further criminal matters, either by appeal or otherwise, and therefore, I suggested that Mr. Fallen secure another attorney without delay so as not to forfeit his right to appeal" (R. 47).

On February 1, Chief Judge Simpson entered an Order styled Order With Respect to Notice of Appeal (R. 49-53), putting the matter down for hearing before Judge Reeves. Court-appointed counsel was "re-appointed counsel • • • for the limited purpose of presenting to Judge Reeves the question of whether his motion for new trial was timely filed and, if so, whether said motion should be granted" (R. 52-53). The Judge found that the provisions of the Rules had not been brought to the attention of petitioner by the Court-appointed counsel, nor the requirements for appeal *in forma pauperis*. The Judge found it was "clear" that "eight days after sentence, Mr. Fallen desired to enter (a) Motion for New Trial, (b) Notice of Appeal, and (c) to be permitted to appeal *in forma pauperis* and to receive a copy of the transcript of record" (R. 52). Petitioner's "letters constitute timely notice of appeal and will be so treated at the proper time by the Court of Appeals." *Ibid.*

Dated February 7 at Atlanta, and received by the District Judge in Jacksonville on February 14, a letter written by petitioner stated that he had asked the Court-appointed counsel after the sentencing to file a motion for new trial, but that counsel had refused, declaring that his firm desired him to withdraw from the case (R. 54). After this conversation with counsel on January 15, petitioner related that:

> "The marshal then carried me back to the hospital and gave orders that I was not to have any visitors so I had not a chance to get anyone else to file for new trial for me. The next morning they brought me to Atlanta. I was sick at that time and it was on January 23, 1962 that I felt well enough to write. I didn't know that the motion had to be within five days but I did know the quicker it was filed the better it would be" (R. 54).

On February 21, the Trial Judge denied the motion for new trial on the merits, expressly not ruling on whether it was timely filed. Also on February 21, Court-appointed counsel filed a formal Notice of Appeal, and the pauper's oath executed by petitioner. On February 26, the Judge signed an Order allowing an appeal *in forma pauperis*.

In the Court below, the Government filed a motion to dismiss on the ground that the notice of appeal was not timely filed, nor the motion for new trial. Counsel was appointed to represent petitioner for the purposes of that motion.

In a divided opinion, the Court granted the motion to dismiss. The majority held that the motion for new trial was not timely filed and did not operate to extend the time for appeal beyond the ten days specified in Rule 37. Further, the majority believed that the Trial Judge was not obligated to advise petitioner of his right to appeal, because the Court-appointed counsel had not, at the sentencing, "somehow disappeared eo instanti." 306 F.2d at 701 (R. 83). Referring to the dictum in *Coppedge* v. *United States*, 369 U.S. 438, 443, fn., that " 'If neither counsel, whether retained or court-appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a prompt notice of appeal, the right of appeal may be irrevocably lost,' " after conviction, 306 F.2d at 701-703 (R. 83-84), the Court held petitioner's right of appeal had been lost because the notice of appeal had not been filed within ten days.

The majority noted that petitioner had not in his affidavit stated that he had attempted to mail his letter of January 23 on the day he wrote it; and the Court stated further that, while the transfer of petitioner to Atlanta "may, to some extent, have delayed the preparation of his notice of appeal, * * * it does not appear that this prevented a

notice of appeal from being filed within the time permitted by the rule." 306 F.2d at 72 (R. 85). As to the status of petitioner's letters on the tenth day, the Court said:

> "The most favorable inference that could be drawn or presumption indulged would be that, on the last day for filing, the notice of appeal was somewhere in the possession of the Post Office Department. Although a more liberal rule may elsewhere prevail, this Court is committed to the principle that the jurisdictional requirement of timely filing of a notice of appeal is not met by the deposit of notice in the mail in time for it to reach the Clerk's office in the usual course of mail delivery within the time allowed." 306 F.2d at 703 (R. 86).[3]

In his dissenting opinion, Judge Rives called attention to the fact that the footnote in *Coppedge* v. *United States, loc. cit. supra,* evidenced the approval of the Supreme Court for the decision in *Williams* v. *United States,* 88 U.S. App. D.C. 212, 188 F.2d 41, which together with other appellate cases, justified accepting a letter sent as soon as the prisoner could send it as timely notice of appeal.[4] Further, the opinion analyzed the requirements imposed by Rule 37 (a)(2) upon the trial Judge, and concluded:

> "Rule 37(a)(2) certainly requires more adequate advice and more effective assistance from the court for a defendant not represented by counsel than appears to have been given in response to the defendant's request. The defendant did not have counsel of his own choice or court-appointed counsel throughout the 10-day period allowed for filing his notice of appeal. That he was not adequately advised of his rights was recognized * * * ."

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[3] Footnotes are omitted from quotations throughout this Brief.

[4] These cases are discussed at pp. 14-17, *infra*.

Although the majority said, "Fallen does not raise any constitutional questions so we are not required to consider whether Courts of Appeal may, as the Supreme Court does, take jurisdiction of a belated appeal in order to vindicate a constitutional right," 306 F.2d at 703 (R. 86), the dissenting opinion declared that failing to hold the appeal timely filed would indeed raise constitutional questions particularly those relating to the right to counsel. 306 F.2d at 706 (R. 91).

Following the decision of the Court of Appeals, petitioner wrote to Judge Rives—the letter, written at Springfield, Missouri, on August 8 was filed at the Court in New Orleans on August 15—supplying certain additional information. Petitioner expressly declared that he put the January 23 letters in the prison hospital mail box on January 23 (R. 96). He stated further that he had not known he had only ten days in which to file a notice of appeal (R. 94).

In this Court, petitioner filed the petition for a writ of certiorari *pro se*. The Government agreed that the writ should be granted, but suggested that the case be remanded for further hearing on two different matters:

1. The conference between petitioner and Court-appointed counsel following the sentencing, the Government stating—without expressly taking a position—that "Under the decision of the court below in *Boruff* v. *United States*, 310 F.2d 918, decided after the decision in this case, it may be significant which version is found to be accurate." Gov. Mem. 4; and

2. The time when petitioner placed his notice of appeal in the prison hospital mail box, the Government stating, "If the delay in forwarding the notice of appeal by petitioner *pro se*, at a time when he was unrepresented by counsel, was found to be the result of government delay,

we would not contend that the notice of appeal was untimely." Gov. Mem. 5.

Summary of Argument

1. Petitioner did all he could do under the circumstances to preserve his right of appeal. He wrote and mailed letters constituting a motion for new trial and a notice of appeal on the eighth day following his conviction. This was sufficient to preserve appellate jurisdiction. It would be unthinkable to hold that a prisoner's appeal rights could be forfeited by delays attributable to prison or other public officials.

This principle has been established by many decisions of this Court, e.g., *Dowd* v. *United States*, 340 U.S. 206. It has been applied in many decisions of the Courts of Appeals, e.g., *Williams* v. *United States*, 88 U.S. App. D.C. 212, 188 F.2d 41, where the prisoner handed his letter of appeal to the deputy Marshal on the seventh day following his conviction, but it was not received by the District Court until the eleventh day. *Williams* has been favorably cited by this Court, *Coppedge* v. *United States*, 369 U.S. 438, 442, fn. 5. Other Courts of Appeals have indulged in presumptions as to the prompt delivery of the mails, have held that defendants may rely upon dates or notices erroneously given them by the Clerk, and have otherwise preserved appellate jurisdiction, although the notice was received tardy, when the appellant had done whatever he himself could do to protect his rights.

2. Petitioner was deprived of his right to counsel during the critical period following his conviction. The counsel appointed by the Court for the purposes of trial did not advise him of his right to appeal or his right to counsel for purposes of appeal, and announced he would undertake

no further action or responsibility, immediately after the sentencing.

The Constitution requires that a defendant enjoy the benefit of counsel throughout all proceedings against him. Decisions of this Court have made clear the right to counsel extends to appeal. Vindication of this Constitutional right requires that the time during which petitioner was not afforded his right to counsel should not be counted as time during which appellate jurisdiction could be forfeited.

3. At the sentencing, petitioner asked the Court about an appeal, and the Court replied only that "the Government provides for that." This was not adequate action by the Court to safeguard petitioner's rights. The Court should have assured itself that petitioner would be advised of his rights to appeal and to counsel for purposes of appeal, either by making certain that the terms of its appointment of counsel extended to the initial appellate steps, or by itself explaining petitioner's rights and directing the Clerk to file the notice of appeal. The purpose and the letter of Rule 37(a)(2) requires no less of the District Court under these circumstances.

The principal authority for the foregoing is a decision of the Court below itself, handed down after the instant case, *Boruff* v. *United States*, 310 F.2d 918. The authority of this case has been recognized in the Government's Memorandum on the Petition for Certiorari in the instant case. *Boruff* provides persuasive suggestions of the standards which this Court should apply in this case.

4. Reversal of the judgment below is not inhibited by *United States* v. *Robinson*, 361 U.S. 220. That case arose under completely different circumstances, a misunderstanding between the prisoners and counsel of their own selection. It decided only a single issue, the power of the Dis-

trict Court to enlarge the time for appeal upon a finding of excusable neglect. No such facts and no such legal issue are presented here. The circumstances here are distinguishable; the legal issues are completely different. Reversal of the judgment below is unaffected by *Robinson*, and is in any event consistent with it.

ARGUMENT

I.

Petitioner's letter, written and deposited in the prison hospital mail box within the ten day period, satisfied the requirements of the rule under the circumstances.

A. The Pertinent Facts Are Established and Clear.

On January 15, after being sentenced, petitioner was returned to the Duval Medical Center in Jacksonville, Florida, where he had been confined during his trial; and, according to petitioner's uncontradicted and unquestioned assertions, the Marshal "gave orders that I was not to have any visitors * * * " (R. 54). The following day, petitioner was transferred by the United States to the Penitentiary in Atlanta, Georgia. At that time, petitioner was ill and could not physically undertake any action with respect to appeal. He did not feel well enough to write a letter until January 23, the eighth day following his sentence. On that eighth day, petitioner wrote letters constituting a motion for a new trial and a notice of appeal, and placed the letters in the prison hospital mail box.

The Government does not suggest it has any evidence suggesting that the letters were not mailed by petitioner on January 23, but only that giving it an opportunity now to cross-examine this petitioner and to make a record about its general prison mail practices "may result in elucidation

of this question." Gov. Mem. 5. This possibility is too remote and speculative as a matter of fact, and irrelevant in any event as a matter of law. Whatever the general practices with regard to prison mail at Atlanta or elsewhere, they may not have been followed in this particular case; the facts as to petitioner's letters would now appear irretrievably beyond demonstrable proof. The record before the Court provides independent proof of petitioner's statement, for subsequent letters of his, one also from Atlanta to Jacksonville dated February 7 and filed February 14 (R. 54), and another from Springfield to New Orleans, dated August 8 and filed August 15 (R. 94), each consumed seven days in the transmission from prison to Court. The letters crucial here consumed only six days, January 23 to January 29, evidently a relatively prompt delivery of mail addressed by prisoners to Courts. In any event, unless the Government now has some basis for asserting that petitioner did not write and mail the letters with all reasonable dispatch as soon as he was well enough to do so, the matter is irrelevant to the issue here presented, whether a prisoner's doing all he can do to preserve his right of appeal safeguards appellate review of his appeal under the Rules. Further, unless the Government has some basis for asserting that the letters were not mailed within the ten day period, or, alternatively, on the ninth day if its position is that the letters should be mailed in time to be delivered in the ordinary course of the mails and it is possible to take judicial notice that mail from Atlanta to Jacksonville would normally be delivered overnight, this Court must take it as uncontradictable that these letters were mailed within the ten day period and in time under ordinary circumstances to be filed with the District Court within that period.

This Court should accept the January 23 date on the letters, as both Courts below did, and accept petitioner's

statement, the only evidence now of record and the only direct evidence which could be adduced, that he placed the letters in the prison hospital mail box on January 23. The factual circumstances are more than ample for determination of the legal issue before the Court. There is no justification and no occasion for a remand.

The facts of record demonstrate that petitioner did everything he could himself do to protect and perfect his right of appeal. He could do no more. To restate what the record makes obvious, he was in the custody of the United States throughout this period—indeed, he had been forcibly removed to a point further distant from the District Court in Jacksonville. Moreover, petitioner, an indigent not advised by the Court as to his rights relating to appeal, had no counsel. Finally, petitioner, confined to a wheel chair under normal conditions, had been ill during this time. As soon as he was well enough to initiate action regarding an appeal, he did so. These circumstances assure the conclusion that petitioner was sufficiently swift and diligent in the protection and preservation of his appeal rights.

B. This Court Has Declared That Appeal Rights Are Maintained When an Indigent Prisoner Does All He Can Do to Preserve Them.

Such conduct constitutes sufficient compliance with the Rules to safeguard the jurisdiction of the Court of Appeals. When a prisoner has done all he can do, and it is the fact of his being in custody and being thus forced to rely on prison officials to transmit his papers which may account for the lateness of the filing with the Court, it is unconscionable to deny him his appeal rights. The Constitution does not permit the destruction of appeal rights because of special barriers imposed by prison or other public officials. *Burns* v. *Ohio*, 360 U.S. 252; *Dowd* v.

United States, 340 U.S. 206; *Cochran* v. *Kansas*, 316 U.S. 255.

The prisoner retains his right of appeal throughout any delays attributable to the actions of public officials. The lapse of time, even far beyond the period normally considered jurisdictional, bears no legal significance under these circumstances, for "nothing short of an actual appellate determination of the merits of the conviction—according to the procedures prevailing in ordinary cases—would cure the original denial of equal protection of the laws." *Dowd* v. *United States*, *supra*, 340 U.S. at 209.

In the context of Rule 37, this Court has inferentially held that "notice of appeal delivered to prison officials for forwarding to District Court" within the ten-day period will satisfy the Rule, by specifying this as one of the "papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, * * * used to preserve the jurisdiction of the Courts of Appeals," consistent with the holding that "the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, *United States* v. *Robinson*, 361 U.S. 220 * * *." *Coppedge* v. *United States*, 369 U.S. 438, 442, fn. 5. The example there cited of a "notice of appeal delivered to prison officials" was *Williams* v. *United States*, 88 U.S. App. D.C. 212, 188 F.2d 41.

C. The Courts of Appeals Have Sustained Appeals Under Analogous Circumstances.

1. *Lateness in Delivery.*

In *Williams*, the petitioner "prepared a communication to the District Court indicating an intention to appeal" on the sixth day of the ten-day period; this was turned over to a deputy United States Marshal on the following

day, but was not received by the District Court until the eleventh day. The Court of Appeals nevertheless held it had jurisdiction.

> "It is clear that petitioner's communication of March 30, 1950 to the clerk of the District Court indicated an intention to appeal. Moreover *the communication was prepared in time, and the petitioner did all he could do to have it delivered to the clerk of the District Court in time.* The fact that it reached the office of the clerk a day late was not the petitioner's fault." 88 U.S. App. D.C. at 213, 188 F.2d at 42. (Emphasis added.)

Williams is by no means the only case accepting this rationale for deciding that appellate jurisdiction attached even though nothing was received and filed by the District Court until after the expiration of the ten-day period. A motion to dismiss the appeal as untimely was denied, for example, in *Remine* v. *United States,* 161 F.2d 1020, 1021 (6th Cir.), *cert. denied,* 331 U.S. 862, the Court holding, "In the circumstances, the timeliness prescribed by the Rules of Criminal Procedure * * * could not reasonably be required of the appellant, confined in a penitentiary of the United States some 2,600 miles away from the district court in which he was convicted and sentenced." In *Oddo* v. *United States,* 171 F.2d 854, 855 (2nd Cir.), *cert. denied,* 337 U.S. 943, the Court would not countenance the dismissal of the appeal "merely because of delay caused by prison routine" in the clerk's receipt of the fee. "To so hold would give his jailer power to prevent an appeal." *Ibid.*

2. *Failure of District Court or Clerk Adequately to Notify Defendant.*

Where the delay is caused by the failure of the Court to make clear the date of its judgment, and petitioner and his attorney were given reason to believe a date subsequent to

the actual entry of the order would be the date of judgment, the Court of Appeals should exercise its jurisdiction. *Rosenbloom* v. *United States*, 355 U.S. 80. And where the delay is caused by the failure of the Clerk promptly to transmit a copy of the judgment to the prisoner, appeals are held timely and within the jurisdiction of the Court of Appeals. That the ten-day rule is jurisdictional is recognized. "But, in view of his incarceration and his conceded efforts to take an immediate appeal as soon as he knew of the entry of the order of dismissal, we think this Court properly may assume jurisdiction and consider this case upon the merits." *Wallace* v. *United States*, 174 F.2d 112, 114 (8th Cir.), *cert. denied*, 337 U.S. 947; *Oddo* v. *United States*, *supra*; *United States* v. *Dunbar*, 212 F.2d 654 (2nd Cir.). Cf. *Lohman* v. *United States*, 237 F.2d 645, 646-647 (6th Cir.); *Carter* v. *United States*, 168 F.2d 210 (10th Cir.).

In the case at bar, to be sure, no delay is claimed in providing petitioner with actual notice of the judgment imposed on him; the delay claimed is in transmitting the timely appeal letter and notice. The identical legal principle is involved, however, namely, that delay attributable to the Government should not vitiate the prisoner's right of appeal.

In justice and reason, no valid distinction can be drawn between a delay attributable to Government officers in transmitting a notice from the District Court to the prisoner and a delay attributable to Government officers in transmitting a notice from the prisoner to the District Court. As validly as the former postpones the commencement of the ten-day period which the terms of Rule 37(a)(2) specify as running from the "*entry* of the judgment or order," the latter postpones the closing of that period. A prisoner is entitled to have delays for which he is not responsible

eliminated from the computation of ten days, eliminated equally whether they occur at the beginning of the period at the responsibility of the Clerk, or at the end thereof at the responsibility of the warden, the postman, or the Clerk.

3. *Failure of Counsel.*

Moreover, a recent decision excuses a delay not attributable to the Government through any of its officials, but to the prisoner's counsel. In *Calland* v. *United States*, 323 F.2d 405 (7th Cir.), petitioner evidently did not communicate with the District Court until October 20 with regard to appealing from a sentence imposed the prior April 10, as he was relying on and communicating with counsel whom he had retained. The holding was as follows:

> "In the case at bar petitioner had at least attempted to safeguard his rights by securing counsel to represent him, and presumptively was in a more secure position than was the prisoner in Boykin [Boykin v. Huff, 73 U.S. App. D.C. 378, 121 F.2d 865], who was not represented by counsel but whose right of appeal was upheld on the facts of that case. In the case at bar, if petitioner's representations of fact are true, he had a right to rely upon his attorney to perfect his appeal and the failure of both of this successive counsel to do so cannot be permitted to work a forfeiture of his right of review by this court if we may by analogy apply the liberal view suggested by the Supreme Court in Coppedge, p. 442, note 5 of 369 U.S., p. 919 of 82 S.Ct., supra, p. 407. * * *
>
> "We agree with counsel for appellant that one, who justifiably believes that he is represented by counsel and who instructs his counsel to appeal and is assured by counsel that the appeal will be filed, should not suffer a loss of rights if counsel proves faithless, any

> more than a defendant whose appeal was delayed in the mails, Reynolds v. United States, 5 Cir., 288 F.2d 78 (1961), or was delayed by act of a court or prison official, Williams v. United States, 88 U.S. App. D.C. 212, 188 F.2d 41 (1951), Wallace v. United States, 8 Cir., 174 F.2d 112 (1949)." 323 F.2d at 407, 408.

If a prisoner who had counsel and did not himself communicate with the District Court within the ten-day period may have his right of appeal sustained as against the Government's reliance on the time limit as jurisdictional and the authority to this effect of *United States* v. *Robinson*, 361 U.S. 220, 323 F.2d at 408. *a fortiori*, this petitioner, who lacked counsel and who himself initiated communication with the Court within the ten-day period, has done enough to assure that his appeal will be reviewed on the merits and not dismissed on jurisdictional grounds.

4. *Presumption of Prompt Postal Delivery.*

Furthermore, the Courts of Appeals have sustained appeals on the basis of assumptions about the postal service which should well be applied here. In *Reynolds* v. *United States*, 288 F.2d 78, fn. 1 (5th Cir.), *cert. denied*, 368 U.S. 883, for example, the Court below held:

> "The notice of appeal was mailed in time to be deposited in the post office box of the District Court Clerk's office on the tenth day. This day happened to be a Saturday and the office was closed. We think that this was sufficient to satisfy the requirements of the Rule since it placed the notice within the Clerk's custody and control."

The foregoing is the entire discussion of the Court on this point. There is no suggestion of a finding, or a basis for a finding, that in fact the letter was delivered on the tenth

day. The most reasonable inference is that this letter was an integral part of the total mail received and reviewed by the District Court Clerk's office for the very first time on the following Monday, the twelfth day. There is no recital of the claimed date of mailing, or the presumed normal time for delivery of mail between the two points involved. It is not a fact, evidently, but a *presumption* based solely on the fact that the letter was received on the twelfth day, a Monday, which is reflected in the crucial assertion that "The notice of appeal was mailed in time to be deposited in the post office box on the tenth day."

The truth of the matter appears to be that there is no more evidence that the letter was in the Clerk's office, rather than in the course of postal delivery, on the tenth day, in *Reynolds* than in the instant case. *Reynolds* is not successfully to be distinguished by confining it, as the majority attempted below, to delivery of mail over a week-end. It rests on a presumption that mail will be delivered promptly and sustains appellate criminal jurisdiction on the basis of that presumption.

The identical presumption was more dramatically applied in *Halfen* v. *United States*, 324 F.2d 52 (10th Cir.). The Court recited that the appellant had deposited the notice of appeal to the District Judge in a mail box at 11:00 a.m. on the tenth day following the conviction, December 28, 1962; that the Judge, being away from his office and out of the City, did not see the letter and turn it over to the Clerk until January 2, 1963, the fifteenth day; and that in the normal course of mail delivery the letter would have reached the Judge "on the afternoon of December 28." 324 F.2d at 54. The Court held that it had jurisdiction over the appeal because the appellant "had done all that he could possibly do to preserve his right of appeal." *Ibid.* While the Court states that "appellant was in custody at the time," it would seem difficult to reconcile that statement

with the finding that "appellant deposited in the mails at Oklahoma City" the appeal notice. *Ibid.* Evidently, he was somehow more at large than petitioner at bar, who was not only in the Atlanta Penitentiary but in its hospital. As the Court in *Halfen* sustained jurisdiction on the basis of a mailing on the tenth day not received until the fifteenth day, by indulging in the presumption that a letter mailed at 11:00 A.M. must have been received the same afternoon, *a fortiori,* jurisdiction must be sustained on the basis of a mailing on the eighth day of a letter received the fourteenth day.

The authority is ample, and the applicable rationale of due process clear and compelling. Petitioner did all he could do. The delay in transmission is attributable to the Government, to the prison or the post office officials and routines. Jurisdiction over the merits of this appeal should, therefore, have been exercised.

II.

The running of the ten day period should be deemed suspended while petitioner did not enjoy the benefit of his right to counsel.

A. The Pertinent Facts Are Established and Clear.

It is clear that petitioner did not enjoy the benefit of his right to counsel, and had not waived that right, during the entire ten-day period subsequent to his sentencing. During the sentencing, neither the Court nor Court-appointed counsel afforded petitioner any notice or advice concerning his right to counsel, or any other aspect of his right to appeal for that matter. After the sentencing on January 15, petitioner and the counsel appointed by the Court for his trial had a talk. Both petitioner and the counsel, in their statements included in the record at bar, are agreed that coun-

sel made clear he would undertake no further action on behalf of petitioner. Counsel regarded himself as acquitted of his Court-imposed obligation. There is no statement to the effect that he advised petitioner as to the time limits or other requirements for indigent appeals, or as to petitioner's right to Court-appointed counsel for purposes of appeal. It is clear petitioner desired to be represented by counsel; but he did not enjoy the assistance of counsel, nor was he advised of his right to counsel, during this critical period.

As the foregoing facts are clear beyond dispute and appear evident from the accounts of both petitioner and Court-appointed counsel, and as the clear facts in petitioner's view demonstrate beyond doubt a deprivation of his right to counsel, there is no justification or occasion for a remand. On the facts which are legally material and governing, there is no disagreement between petitioner and counsel, and *a fortiori*, no such "sharp difference" between them as the Government alleged in its bid to have the case remanded. Gov. Mem. 4. There may be differences of detail, for there certainly is a difference in the ability of the two men to express themselves, a difference which is reflected in the concept of right to counsel; but these differences of detail or expression are immaterial and can scarcely affect the governing fact that the record stands ready for the judgment of this Court.

B. Petitioner Was Deprived of His Right to Counsel.

There can be no doubt that the Constitutional right to counsel extends to appeal. *Hardy* v. *United States*, 375 U.S. 277; *Chessman* v. *Teets*, 354 U.S. 156; *Johnson* v. *United States*, 352 U.S. 565; cf. Rule 44. The "Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness * * *." *Coppedge* v. *United States*, 369 U.S. 438, 446.

"Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel." *Ellis* v. *United States*, 356 U.S. 674, 675, quoted approvingly in *Hardy* v. *United States, supra*, 375 U.S. at 281.

The Sixth Amendment has been violated here as it is true of petitioner "that—after conviction—he was unable to obtain a lawyer; was ignorant of the proceedings to obtain new trial or appeal and the time limits governing both; and that he did not possess the requisite skill or knowledge properly to conduct an appeal, he says that it was—as a practical matter—impossible for him to obtain relief by appeal." *Johnson* v. *Zerbst*, 304 U.S. 458, 467. At any time during the proceedings that the accused or the convict is deprived of the right to counsel, "the court no longer has jurisdiction to proceed." *Id.* at 468. From January 15, when Court-appointed counsel, without filing a motion for new trial or a notice of appeal, considered that the terms of his appointment had been fulfilled and ceased representing petitioner, until February 1 for the purpose of the timeliness of the motion for new trial, for that was the sole responsibility assigned to re-appointed counsel by the Court at that time, and until February 21 when finally counsel filed the notice of appeal and the requisite papers for an appeal *in forma pauperis*, the District Court lacked jurisdiction to impose adverse orders upon petitioner with respect to the proceedings and matters upon which there was deprivation of the right to counsel.

What occurred in this case may not be unusual; it appears to be the normal course that Court-appointed counsel regard their duty as terminated with the sentencing and as thus not embracing the filing of either a motion for new trial or a notice of appeal.[5] It is theoretically more difficult

[5] *Hardy* v. *United States*, 375 U.S. 277, 282, 283-284 (concurring opinion). "Although it is not clear that the services of appointed trial defense counsel are at an end once the defendant has been

to understand the failure to file the motion for new trial than the notice of appeal, for the former seems unquestionably an aspect of the "trial" for which the counsel was appointed, whereas the latter is associated with the next stage in the Court of Appeals.[6] This Court has been recently concerned with the duty of counsel appointed by the Courts of Appeals in indigent cases, reiterating that they must act as advocates. *Hardy* v. *United States*, 375 U.S. 277, 281; *Ellis* v. *United States*, 356 U.S. 674, 675. It may not be inappropriate for the Court to make clear that counsel appointed by the District Court must meet an identical standard with particular reference to the motion for new trial.

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sentenced, such is the usual practice." Ehrenhaft, *Are The Paupers Pampered? Indigent Appellants in the Federal Courts*, 46 A.B.A. Journal 646, 647.

"During the period immediately after sentencing, opportunity arises for an unintended hiatus in furnishing effective assistance of counsel. * * * In other words, at this point the defendant's assigned trial counsel frequently has bowed out of the case, but no successor has been appointed to assist the defendant in connection with steps to effect an appeal. A sampling of experience in other federal districts indicates that this is by no means confined to the District of Columbia although the propriety of the hiatus is questionable." Boskey, *The Right To Counsel In Appellate Proceedings*, 45 Minn. L. Rev. 783, 789, 789-790. "The Committee's studies indicate that few lawyers appointed in the district courts take their clients' cases to the courts of appeals for review or recognize an obligation to advise him of his rights to appeal. * * * Typically, the defendant is without counsel in the critical period between sentence and disposition of the application for leave to appeal *in forma pauperis*." Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Report on Poverty and the Administration of Federal Criminal Justice*, 111, 100. See also Ridge, *The Indigent Defendant*, 24 F.R.D. 241, 251-252, quoted at pp. 30-31, *infra*; Note, *Aid For Indigent Litigants in the Federal Courts*, 58 Col. L. Rev. 832, 836, fn. 29.

[6] "Even if the statement that an accused is entitled to counsel in every stage of the proceeding merely referred to trial proceedings, there would hardly be much doubt that at least a motion for a new trial is part of the trial proceeding." Note, *The Right To Benefit of Counsel Under the Federal Constitution*, 42 Col. L. Rev. 271, 277.

In this case, while the papers do not contain the terms of the appointment of counsel by the District Court—and it may be normal for there to be no formal order or entry of appointment in the record—it is clear that the District Court did not regard its original assignment of counsel to embrace the motion for new trial. For its February 1 Order "re-appointed" the counsel "for the limited purpose of presenting to Judge Reeves the question of whether his motion for new trial was timely filed and, if so, whether said motion should be granted" (R. 52-53). Obviously, the original appointment was assumed to have terminated at the sentencing for the purposes of sentencing. Petitioner was thus deprived of his right to counsel for purposes of the motion for new trial, as well as appeal generally.

The motion for new trial assumes vital importance under the Rules not only for its intrinsic merits but because of the vital impact of its being filed upon the time within which the notice of appeal may be filed. Had Court-appointed counsel promptly filed the motion for new trial within the time limits prescribed by the Rules, and had he then taken the very actions which he later undertook by virtue of his re-appointment, this appeal would long since have been disposed of on its merits.

Petitioner was entitled to the effective assistance of trial counsel for the purpose of the motion for new trial. As he was deprived of that right, the Court of Appeals holding that the motion was not filed timely cannot be sustained, and its consequent judgment that the appeal was untimely must be reversed.

The fact that what transpired here is the rule rather than the exception affords eloquent plea that this Court should address itself to this evident deprivation of Constitutional rights. Surely the general prevalence of a legal practice cannot excuse in Constitutional terms, however

much it may explain in human terms, the deprivation of this petitioner's right to counsel at a vital stage of his case. And that such deprivations of Constitutional rights may have been practiced for a long time certainly provides no basis for failing to rectify it at the bar of this Court.

> "Evidently it needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. • • • We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States." *Chessman* v. *Teets,* 354 U.S. 156, 165.

Indeed, the Court below has itself recognized the Constitutional imperative of holding appellate jurisdiction unimpaired by any period during which the prisoner was not afforded the right to counsel, in a decision rendered subsequent to the one now before this Court. In *Boruff* v. *United States,* 310 F.2d 918 (5th Cir.), the authority of which the Government has already inferentially recognized in this case, the Court below took jurisdiction of the appeal (and on the merits reversed the conviction), although the appeal was not filed until almost four months after the conviction, because of the denial of the right to counsel. On this point, the essence of the Court's reasoning was as follows:

> "The ten-day period during which a convicted person has a right to file notice of appeal may be long enough under ordinary circumstances, but no one can gainsay the fact that it is a very short time, and would be an

utterly unrealistically short time, for a person who was not guided during every moment of the ten days by the advice of counsel. * * * We conclude, therefore, that the ten day period within which Boruff was required to file his notice of appeal did not commence to run until he was actually notified of his right to appeal and his right to have counsel to assist him, under the peculiar facts of this case." 310 F.2d at 921, 921-922.

The "peculiar facts" of *Boruff*—the failure of Court-appointed counsel as well as the Court to advise him with regard to his right of appeal—are identically presented in this case. The results in the two cases should be identical.

III.

The failure of the District Court adequately to advise petitioner of his rights to appeal and to counsel requires the reversal of the judgment below.

A. The District Court Did Not Meet Its Obligations Under Rule 37(a)(2).

At the sentencing the following colloquy occurred:

"The Defendant: May I appeal this case as an insolvent?

"The Court: Oh, yes, you always have a right to appeal; the Government provides for that.

"So that will be all. We are through with this case.

"Mr. Marshall, you may take charge of the defendant" (R. 41).

Obviously, in this case, as in *Boruff* v. *United States*, *supra*, 310 F.2d at 919, "the Court itself did not advise appellant of his right to appeal, or of his right to have coun-

sel represent him if he should choose to do so." Consequently the appeal should be considered timely, as it was in *Boruff*, where the Court below on this point reached the following conclusions:

> "We think that the positive mandate contained in Rule 37(a)(2) that '(w)hen a court after trial imposes sentence upon a defendant not represented by counsel, the defendant *shall be advised of his right to appeal,*' coupled with Rule 44 of the Rules, '(i)f the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him *at every* stage of the proceeding unless he elects to proceed without counsel or is unable to obtain counsel,' compels the conclusion that Congress sought to protect against the very deprivation of a constitutional right that is threatened, whether through inadvertence, or lack of understanding of counsel of his full obligation under the appointment of the court. * * *
>
> "We think that the obligation of the trial court under Rule 44 is to see that counsel appointed to assist an accused during the trial includes the obligation to advise him with respect to his rights during the ten day period within which the final proceedings in the district court may be taken by him to assure him of his right to appeal. We think also that it is not an unwarranted construction of the language of Rule 37(a)(2) to construe the words 'defendant not represented by counsel' to mean a 'defendant not represented by counsel during the ten day period' after which his failure to file a notice of appeal would forever bar such right." 310 F.2d at 921 (emphasis in original).

There would appear no plausible disagreement with the *Boruff* reading of Rule 44's guaranty of the right to counsel "at every stage of the proceedings" to include appeal and

the filing of a notice of appeal. But the wording of Rule 37 (a)(2), imposing certain obligations upon the District Court when it "imposes sentence upon a defendant not represented by counsel," may raise plausible inquiry as to the time or function when defendant is not represented by counsel. The most restricted reading, and this is the one indulged in by the majority opinion below, is that the meaning can be only not represented by counsel at the time of the sentencing for the purposes of the sentencing. Analysis of the context and intent of the language, however, requires rejection of the majority judgment below and the acceptance of the decision in *Boruff*.

Rule 37 is concerned exclusively with appeal, not sentencing. It is the first Rule in Part VIII of the Rules which is titled and addressed to "Appeal." The preceding part embracing Rules 32-36, inclusive, is titled and addressed to "Judgment." In Rule 37 (a)(2) itself, the second sentence, which contains the introductory phraseology in issue, imposes the duty upon the Court to advise defendant of his right to appeal, and if the defendant so requests—as petitioner in effect did here—the Court is to direct the Clerk to "prepare and file forthwith a notice of appeal on behalf of the defendant." Manifestly, the purpose was to protect the appeal rights of defendants not represented by counsel.

The assumption imbedded in the language must necessarily have been that a counsel appearing at the sentencing will advise the defendant of his rights of appeal. That assumption is realistic when counsel appearing is one of the petitioner's choice. Normally the Court would have no duty to inquire as to the terms of the representation between the defendant and counsel selected by him. But when counsel is Court-appointed, the situation is quite different. The duration of the assistance of counsel is completely in the hands of the Court, and is completely out of the hands

of the defendant. Unless the Court undertakes action to clarify or define the time and proceeding extent of the representation, the appeal rights of the defendant may not be protected at all. As a practical matter, it is an unrealistic assumption to postulate that trial Court-appointed counsel will take any action with respect to their defendant's appeal. See pp. 22-23, *supra*. The fact is that in this case, as evidently in others as a general rule, Court-appointed counsel present physically for purposes of sentencing is absent professionally for purposes of motion for new trial and notice of appeal.

It would be extreme to conceive that the drafters of the Rules intended to relieve the Court of responsibility under wording dedicated to protecting the rights of appeal of an indigent defendant at the time of the sentencing. Cf. *Hodges* v. *United States*, 368 U.S. 139, 140 fn. (dissenting opinion). As there is no necessary continuity generally in Court-appointed counsel between trial and appeal—in this case the original appointment concluded at the sentencing and certainly did not include appeal—Rule 37 (a)(2) was intended, and should be interpreted, to impose a duty on the District Court to insure that the defendant's appeal rights would not thereby be forfeited.[7]

The Rule was not intended, and should not be applied, as sanctioning the irrevocable forfeiture of the indigent defendant's right of appeal, if neither Court-appointed counsel nor the Court takes any action at the time of sentencing. This "may" be the result, as noted in *Coppedge* v. *United States*, 369 U.S. 438, 443, fn., if the defendant never becomes sufficiently apprised of his rights to raise the issue. But when the unfortunate circumstance occurs and the unfortunate defendant raises the issue, if it "must"

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[7] *Hardy* v. *United States*, 375 U.S. 277, provides recent demonstration of the significance of a change in Court-appointed counsel between trial and appeal.

be the result that inaction by the Court and the counsel it appointed irrevocably loses the defendant's appeal rights, questions of Due Process magnitude are presented.

To conceive an extreme example in order to make the point, assume that the District Court directs Court-appointed counsel that counsel's duties are terminated with the sentencing and that counsel should not discuss appeal with the defendant, and assume further that at the sentencing the District Court, deliberately to defeat the appeal rights of the particular defendant, refrains from advising him of his right to appeal. Is there doubt, if any such situation came to light, that the Constitution would command that defendant be accorded "actual appellate determination of the merits," *Dowd* v. *United States*, 340 U.S. 206, 209, and not merely the lesser right of collateral attack? In effect, Due Process standards would require that the letter of Rule 37(a)(2) should be applied in that case according to its spirit and manifest purpose.

As District (now Circuit) Judge Ridge wrote in *The Indigent Defendant*, 24 F.R.D. 241, 251-252:

> "Therefore, the first step in due process seemingly places responsibility on the District Court to see that an indigent defendant is represented by counsel in connection with his right to appeal. * * * But in many instances it appears that after the indigent defendant has been tried, convicted and sentenced, appointed counsel deems that he has fulfilled his function and has no further obligation to the indigent defendant, or he withdraws from the case * * *. * * * So, in the face of that sort of a situation, it appears that the first procedural step, after trial, conviction and sentence of an indigent defendant in the District Court, is for the Trial Judge to determine whether trial appointed counsel has advised the indigent defendant of his right of appeal

> and made known to him any 'possible error' committed at the trial which that counsel might consider as the basis for appeal, before he is permitted to withdraw from the case, or the defendant is allowed to reject such counsel and proceed *pro se*. The latter procedure should be utilized for the reason that if the indigent defendant is not advised, the trial court apparently has the duty, within the intent of Rule 37(2) of the Federal Rules of Criminal Procedure, to 'advise the defendant of his right to appeal and if he so requests, the clerk (must) prepare and file forthwith a notice of appeal on behalf of the defendant' ".

After all, "when the fundamental rights of citizens are at stake, more especially when they are those of indigent persons relating to their lives or personal liberty, there is an affirmative duty which, however undefined in ultimate scope, requires not only that the court not mislead, but that it positively and fully inform the accused concerning his basic rights. * * * Judicial objectivity may be served by keeping hands off when parties are adequately represented. But that is not true when poor persons have no counsel and the effect of inaction is to commit the preservation of their elemental rights to their own ignorance." *Boykin* v. *Huff*, 73 U.S. App. D.C. 378, 383, 121 F.2d 865, 870.

In this case, petitioner attempted to redress his ignorance at the sentencing, by asking the Court about his right of appeal. The reply, "the Government provides for that," was fatally inadequate. At the worst, this might have been taken as an assurance that petitioner need do nothing, the Government on its own initiative solely would provide for the protection of his right of appeal; and if the petitioner had acted in reliance on this indication by the Judge, petitioner would have done nothing himself. This might have tolled the running of the ten days until such time as petitioner had notice that no action was being taken by the

Court and the Government towards his appeal. See cases cited pp. 15-17, *infra*. At the best, the Judge's reply could have been taken, as it was, as meaning nothing; and thus petitioner felt, and happened to act as promptly as he could on his assumption, that he had better do something himself about appeal. The reply by the Judge, and the resultant judicial inaction, was not consonant with the requirements of Rule 37(a)(2) in particular and the requirements of Due Process in general.

This Court should hold trial Judges to a higher standard with respect to the appeal rights of indigent defendants. The District Court should have assured itself that petitioner's appeal rights would be adequately explained to him and safeguarded for him, either by Court-appointed counsel or by the District Court itself. This the District Court did not do. It would, accordingly, violate elementary fairness to hold that the consequent lateness in the filing of the notice of appeal should deprive the Court of Appeals of jurisdiction over the merits.

B. The District Court's Denial of the Motion for New Trial on the Merits Made the Appeal of Petitioner Timely.

Moreover, the foregoing discussion is not confined to the notice of appeal; it embraces the motion for new trial, which would have automatically extended the time for filing the notice of appeal if properly filed with the assistance of counsel. Additionally with regard to the motion for new trial, attention must be paid to this crucial fact: the District Court considered and decided it *on the merits* (R. 63). That motion was thereby accorded substantive legal recognition and disposition; it was no technical legal maneuver by petitioner, artificially concurred in by the Court, for the sole purpose of gaining an otherwise unmerited extension of time for appeal.

This Court has recognized that "when a court considers *on its merits* an *untimely* petition for a rehearing, or an *untimely* motion to amend matters of substance in a judgment, *the time for appeal may begin to run anew from the date on which the court disposed of the untimely application.*" *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 210 (emphasis added); and cases there cited. The same considerations are applicable here. This appeal should, therefore, be considered timely on the basis of the notice of appeal and other appeal papers filed after the District Court's denial of the motion on the merits.

This conclusion would not be attenuated by an assumption that the District Court may have considered the motion, on the merits, at least in part because the Court may have come to doubt that it had afforded petitioner the full measure of protection for his appeal rights at the sentencing which the Rules define and require. The objective fact remains that the motion was disposed of on the merits.

At any rate, if there was any such subjective motivation as indicated, the foregoing discussion demonstrates it was soundly based. This Court should reverse the judgment below on the basis of the action and the inaction, specified in the discussion of this point, of the District Court.

IV.

The Robinson case does not inhibit reversal of the judgment below.

In the light of the foregoing, reversal of the judgment below that the appeal must be dismissed as untimely is called for and is not inhibited by *United States* v. *Robinson*, 361 U.S. 220, on which the Court below principally relied. This case is distinguishable. The issues presented here were not raised in *Robinson;* the solitary issue raised and decided in *Robinson* is not presented in this case.

This case involves an indigent petitioner who was represented by Court-appointed counsel at his trial. Within the ten day period, petitioner did all he could do, in the light of his incarceration, his physical condition, and his deprivation of the assistance of counsel, to protect his own appeal rights, by writing and placing in the prison hospital mail a motion for new trial and a notice of appeal. Petitioner had no counsel subsequent to his sentencing during the time pertinent to his appeal rights, and was not advised of his right to counsel. At his sentencing, he asked the District Court about appeal, and the Court took no action, although the Court had appointed petitioner's attorney and was thus aware that the terms of the appointment did not embrace either a motion for new trial or a notice of appeal.

None of these governing circumstances was involved in *Robinson*. The Robinsons were represented at their trial by counsel of their own choice. They did nothing within the ten-day period to protect their own appeal rights, relying on the understanding which they thought they had with their counsel. They enjoyed the assistance of counsel throughout the period. There was no occasion for the District Court to take any action under Rule 37(a)(2) since counsel present at sentencing was counsel of the Robinsons' own choice, and every indication was that he was present for all purposes and had advised them fully about their rights.

In *Robinson*, the Court said, "The single question presented is whether the filing of a notice of appeal in a criminal case after the expiration of the time prescribed in Rule 37(a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45(b), has found that the late filing of the notice of appeal was the result of excusable neglect." 361 U.S. at 222. That issue arose in the following unique procedural context.

The notice of appeal was not filed until the twenty-first day after judgment of conviction. When the Government moved to dismiss the appeal, affidavits were presented in opposition which established that the late filing resulted from a misunderstanding between one of the defendants and counsel, each believing the other was to file the notice. The Court of Appeals held that the appeal could be held timely if the District Court had found that failure to file the notice timely was the result of excusable neglect, and remanded for further factual determinations on this issue, which were made. The Court of Appeals held that the time could be enlarged for excusable neglect under Rule 45(b). Thus was posed the sole legal issue before this Court.

That issue is alien to this case. Whatever the ultimate definition of "excusable neglect," it surely includes a misunderstanding between a party and his counsel, such as was involved in *Robinson*, but could not possibly be involved here. Petitioner is hardly in a position to present any such misunderstanding; he is relying on lack of counsel during this time period, on the deprivation of his right to counsel as guaranteed him by the Constitution and as should have been assured him by the District Court. In addition, whatever "neglect" may comprehensively include, the word denotes failure of care or attention. Petitioner is not relying on any such circumstance—he is not relying on "neglect" at all, let alone "excusable neglect." To the contrary, he relies on his own diligence in doing everything he himself could possibly do to protect his appeal rights. If any neglect there be in this case, it is not that of petitioner, but of the District Court and Court-appointed counsel, and theirs is inexcusable under the Rules and the Constitution.

Robinson, which decided that a finding of excusable neglect under Rule 45(b) did not extend the time for filing

the notice of appeal, has no application here. *Robinson* does *not* hold, and could not have held in view of the solitary issue presented in it, that criminal appeals must automatically be dismissed on jurisdictional grounds whenever a notice of appeal has not been filed with the District Court within the ten-day period following the judgment of conviction. Indeed, this position was not even argued to the Court; the Government, as it already has here, recognized in *Robinson* that apparently tardy notices of appeal support the exercise of appellate jurisdiction under exceptional circumstances.[8]

Semantics may play a most confusing and misleading role here, and especially the word "jurisdictional." *Robinson* has been frequently cited and quoted for its statement, "Every other decision to which we have been cited, and that we have found, holds that the filing of a notice of appeal within the ten-day period prescribed by Rule 37 (a)(2) is mandatory and jurisdictional." 361 U.S. at 224.[9] This statement may have solved the *Robinson* issue of

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[8] In its petition, the Government stated, "Courts have departed from the strict rule of formal compliance * * * only in exceptional circumstances when a defendant being incarcerated without counsel has had no notice of the judgment which commences the running of the ten-day period. See *Wallace* v. *United States*, 174 F.2d 112 (C.A. 8), *cert. denied*, 337 U.S. 947. For example, it has been held that the period begins to run only upon the receipt of the notice required by Rule 49(c) (*Oddo* v. *United States*, 171 F.2d 854 (C.A. 2)) * * *." *United States* v. *Robinson*, No. 16, October Term, 1959, Government Petition for Certiorari, p. 5, fn. 1. Further, the Government contended, "There have been problems of interpretation, such as when the time starts * * *. And there have even been cases which upheld an appeal years after the judgment, where some timely notice was discovered. But no case has been found, other than the decision below, which allowed a late filing for excusable neglect." *Id.*, Government Brief, 27, 28.

[9] But cf. cases cited in footnote 8, *supra*; *Williams* v. *United States*, 88 U.S. App. D.C. 212, 188 F.2d 41 and *Remine* v. *United States*, 161 F.2d 1020 (6th Cir.), cert. denied, 331 U.S. 862, discussed pp. 14-15, *supra*.

whether another Rule may be utilized to augment the ten days prescribed in 37(a)(2). But this dictum only asks, it does not help answer, any issue about the interpretation of Rule 37(a)(2) itself.

The issues posed in this case, for example, are whether the time period of Rule 37(a)(2) may constitutionally or consistently with Rule 44 be taken as running against a prisoner who has been deprived of his right to counsel and has not received minimally adequate reply to his inquiry about appeal to the District Court at the sentencing, and whether petitioner's doing all he could do himself to protect his appeal rights during the ten-day period, and particularly his writing and placing in the prison hospital mail box on the eighth day a motion for new trial and a notice of appeal, satisfy the requirements of Rule 37(a)(2). These issues will hardly disappear *eo instanti* with the recital of the words, "mandatory and jurisdictional." Indeed, the Rule will remain identically "mandatory and jurisdictional" whatever the Court's resolution of the issues at bar.

This is in effect the view of *Robinson* taken by this Court in its holding that "Although the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, *United States* v. *Robinson,* 361 U.S. 220, a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Courts of Appeals," and its citing as one example, "*Williams* v. *United States,* 88 U.S. App. D.C. 212, 188 F.2d 41 (notice of appeal delivered to prison officials for forwarding to District Court)." *Coppedge* v. *United States,* 369 U.S. 441, 442, fn. 5. *Williams* and the many other cases cited in this Brief where Courts of Appeals have recognized that their appellate jurisdiction has been preserved are consistent with *Robinson.* Indeed,

those subsequent to *Robinson* invariably cite that case. See, e.g., *Boruff* v. *United States, supra,* 310 F.2d at 921. Accordingly, the *Robinson* case stands not at all in the way of directing the Court below to review this appeal on its merits.

CONCLUSION

The record before the Court is ample and clear. There is no occasion for a remand. The material and undisputed facts demonstrate that petitioner did all he could do under the circumstances to preserve his right of appeal; that he was deprived of his right to counsel; and that the District Court did not fulfill the duties ascribed to it by the Rules with respect to petitioner's rights of appeal and of counsel. There is no authority inhibiting the reversal of the judgment below. To the contrary, there is ample authority that the appeal must be considered timely under these circumstances and should have been reviewed on the merits by the Court of Appeals.

For the reasons stated herein, the judgment below should be reversed and the cause remanded with direction that the Court of Appeals decide petitioner's appeal on the merits.

Respectfully submitted,

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